

Teamsters Union Local No. 293, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (R. L. Lipton Distributing Co., Inc.) and Robert J. Velotta and Cuyahoga County Beer Distributors Association, Inc., Party in Interest. Case 8-CB-6904

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

Upon a charge filed by Robert J. Velotta, an individual, on December 21, 1990, the General Counsel of the National Labor Relations Board issued a complaint on February 4, 1991, against Teamsters Union Local No. 293, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, the Respondent, alleging that it has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act.

With respect to the unfair labor practices, the complaint alleges in substance that the Respondent has violated Section 8(b)(1)(A) by maintaining a provision in its collective-bargaining agreement with the Cuyahoga County Beer Distributors Association, Inc., of which R. L. Lipton Distributing Co., Inc., the Employer, is a member, providing that union shop stewards receive 45 cents per hour in addition to their regular rate of pay and that the Respondent also has violated Section 8(b)(2) by causing and attempting to cause the Employer and other members of the Association to discriminate against employees who are not shop stewards by denying them the benefit of the 45-cent-per-hour wage increase. Thereafter, the Respondent filed an answer and an amended answer to the complaint admitting in part and denying in part the allegations in the complaint and raising certain affirmative defenses.

On September 30, 1992, the General Counsel filed a Motion for Summary Judgment. On October 2, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed an opposition to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The complaint, the Respondent's answers, and uncontroverted documents submitted by the General Counsel in support of the Motion for Summary Judgment show that on or about June 1, 1990, the Respondent and the Cuyahoga County Beer Distributors Association, Inc., the Association, entered into a col-

lective-bargaining agreement. Since June 25, 1990, the Respondent and the Association have maintained a provision in their contract which provides in pertinent part at article XI:

The Shop Steward shall be paid, in addition to his regular rate of pay, at the rate per hour (based on forty (40) hours per week) of:

\$.45 per hour

Article XI of the contract also provides that the Union will appoint one shop steward at each plant, who is to "ascertain the standing of the various and several Union members . . . reporting said standing to the Local Union." It is the shop steward's responsibility, under article XI, to notify the Union of any and all grievances that arise at the steward's place of employment.

The General Counsel, as noted, contends that the Respondent has violated Section 8(b)(1)(A) by maintaining and enforcing a contract provision that requires the payment of a higher wage rate to union shop stewards because they serve as stewards and that the Respondent also violated Section 8(b)(2) by causing the Employer and other members of the Association to discriminate against employees who are not shop stewards in violation of Section 8(a)(3). We agree with the General Counsel and, therefore, we shall grant the Motion for Summary Judgment.

In considering the issues raised here, we rely principally on the following holding of *Dairylea Cooperative*, 219 NLRB 656, 658 (1975), enf'd. 531 F.2d 1162 (2d Cir. 1976):

[S]uper seniority clauses which are not on their face limited to layoff and recall are presumptively unlawful, and the burden of rebutting that presumption (i.e., establishing justification) rests on the shoulders of the party asserting their legality.

Article XI of the relevant contract here provides that union shop stewards receive 45 cents per hour in addition to their regular pay. Thus, because the super-seniority accorded to shop stewards in this case is not limited to layoff and recall, there is a presumption under *Dairylea* that the contract provision bestowing this monetary benefit exclusively on union stewards is unlawful.

The Respondent, in its opposition brief, points out that article XI of its collective-bargaining agreement does not require that shop stewards be union members. The Respondent also stresses that in this case the General Counsel failed to show whether union officials appoint the shop stewards or whether the unit employees elect them and the Union then appoints them in accord with the election results. The Respondent contends that, in the absence of evidence on these two critical issues, summary judgment cannot be granted. Accord-

ingly, the Respondent urges the Board to deny the General Counsel's Motion for Summary Judgment.

The contractual provision requiring employers to pay union shop stewards an additional wage of 45 cents per hour on its face provides a monetary reward for service as a union agent within the plant, so it plainly has a tendency to encourage union activity. Because only stewards receive these additional payments, we find that they interfere with the unit employees' Section 7 right to refrain from engaging in union activities in violation of Section 8(b)(1)(A). See *Teamsters Local 20 (Seaway Food Town)*, 235 NLRB 1554, 1558 (1978). Further, these payments also violate Section 8(b)(2), as alleged in the complaint, because they cause employers to discriminate against employees who do not serve as shop stewards. Although there is no requirement in the Respondent's collective-bargaining agreement with the Association that employees acting as stewards must also be union members, the Board in *Dairylea* made the assumption that labor organizations, in naming their stewards, would choose employees who generally believed in and supported union policy and goals.¹ Furthermore, contrary to the Respondent's argument, the Board found in *Seaway Food Town*, supra at 1556, that the union's maintenance and enforcement of a similar contractual provision violated Section 8(b)(1)(A) and (2) of the Act where the evidence showed that the unit employees elected their shop stewards.

Finally, we reject the Respondent's arguments in its amended answer that the complaint and its underlying charge are barred by either Section 10(b) of the Act or the doctrine of laches. Because the contractual requirement of additional hourly pay for shop stewards is invalid on its face, Section 10(b) does not preclude the Board from finding that the provision is unlawful more than 6 months after the execution of the contract because of the continuing nature of the violation.² Further, the doctrine of laches is not applicable to the filing of a charge whose timeliness is determined solely by Section 10(b). Regarding the Respondent's contention that the doctrine of laches barred issuance of the complaint, the Board has consistently held that laches is generally not a valid defense in Board proceedings and the Respondent has failed to show any prejudice that would justify its application here.³

For these reasons, we find that the Respondent has violated Section 8(b)(1)(A) and (2) of the Act by

maintaining the provision in article XI of its collective-bargaining agreement with the Association providing additional hourly pay for union shop stewards.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and the Respondent admits, that the Employer is a beverage distributor, which annually, in the course and conduct of its business operations, sells and ships from its Cleveland, Ohio facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Ohio. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent also admits, as alleged in the complaint, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

On or about June 1, 1990, the Respondent and the Association entered into, and since June 25, 1990, have maintained an agreement which provides, inter alia, that "[t]he Shop Steward shall be paid, in addition to his regular rate of pay, at the rate per hour (based on forty (40) hours per week) of: \$.45 per hour."

For the reasons stated above, we grant the General Counsel's Motion for Summary Judgment and find that the Respondent has violated Section 8(b)(1)(A) by maintaining this contractual provision in its collective-bargaining agreement with the Association and has violated Section 8(b)(2) by causing and attempting to cause the Employer and other members of the Association to discriminate against employees who are not shop stewards in violation of Section 8(a)(3) by denying them the benefit of the 45-cent-per-hour wage increase accorded shop stewards.

THE REMEDY

Having found that the Respondent has violated Section 8(b)(1)(A) and (2) of the Act, we shall order that it cease and desist and that it take certain affirmative action to effectuate the policies of the Act.

Further, having found that the contractual provision which accords union shop stewards an additional payment of 45 cents per hour to be unlawful, we shall order that the Respondent cease and desist from maintaining such clause in its collective-bargaining agreement with the Cuyahoga County Beer Distributors Association.

¹ *Dairylea*, supra at 657-658. In any event, the employee selected as steward, regardless of membership, acts as the union's agent in representing employees vis-a-vis the employer. Because the contract grants the wage premium solely on the basis of steward status, the employee serving as steward is rewarded for his or her union activities.

² *Great Lakes Carbon Corp.*, 152 NLRB 988 (1965), enf'd. 360 F.2d 19 (4th Cir. 1966).

³ *F. M. Transport*, 302 NLRB 241 (1991), and cases cited there.

CONCLUSION OF LAW

By maintaining a clause in its collective-bargaining agreement with the Cuyahoga County Beer Distributors Association, Inc., which accords union shop stewards an additional payment of 45 cents per hour because they are shop stewards and by causing and attempting to cause the Employer and other members of the Association to discriminate against employees who are not shop stewards in violation of Section 8(a)(3) by denying them the benefit of the 45-cent-per-hour wage increase accorded shop stewards, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

ORDER

The Respondent, Teamsters Union Local No. 293, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining the clause in its collective-bargaining agreement with the Cuyahoga County Beer Distributors Association, Inc., which accords union shop stewards an additional payment of 45 cents per hour.

(b) Causing and attempting to cause R. L. Lipton Distributing Co., Inc. and other members of the Cuyahoga County Beer Distributors Association, Inc. to discriminate against employees who are not union shop stewards by denying them the benefit of the 45-cent-per-hour wage increase accorded shop stewards.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business office, hiring hall, and meeting halls copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director with a sufficient supply of signed copies of the notice for posting, if so desired, by R. L. Lipton Distributing Co., Inc., and

other employer members of the Cuyahoga County Beer Distributors Association, Inc. at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DEVANEY, dissenting.

I would deny the General Counsel's Motion for Summary Judgment and remand this proceeding for a hearing. First, the contract provision does not require that shop stewards be union members. While the Respondent has the authority to appoint stewards, there is no evidence that only union members are stewards. Second, there is no record evidence as to whether the stewards are elected and appointed only in accord with the election results. I would note that the General Counsel further relies heavily for his position on the Board's decision in *Plumbers Local 119 (Mobile Mechanical Contractors)*, 255 NLRB 1056 (1981). However, the Board in that case adopted the judge's findings of violations pro forma in the absence of exceptions. *Id.* at fn. 1.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain the clause in our collective-bargaining agreement with the Cuyahoga County Beer Distributors Association, Inc., of which R. L. Lipton Distributing Co., Inc. is a signatory member, which accords union shop stewards an additional payment of 45 cents per hour because they are shop stewards.

WE WILL NOT cause or attempt to cause R. L. Lipton Distributing Co., Inc. and other members of the Cuyahoga County Beer Distributors Association, Inc. to discriminate against employees who are not union shop stewards by denying them the benefit of the 45-cent-per-hour wage increase accorded shop stewards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TEAMSTERS UNION LOCAL NO. 293, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."